LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 6 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 125

IN THE MATTER

of

EDWARD LAMB, FRANK C. OSWALD, EDWARD LAMB ENTERPRISES, INC. and AIR-WAY INDUSTRIES, INC.,

Petitioners,

against

ISADORE BLAU, a stockholder of Air-Way Industries, Inc., suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Air-Way Industries, Inc.,

Respondent.

BRIEF OF RESPONDENT

MORRIS J. LEVY,
Attorney for Respondent,
261 Broadway
New York, N. Y.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
1. The Nature and Purpose of the Statute	2
2. Facts	3
Argument	3
1. The Findings of the Trial Court were clearly erroneous, and, therefore, not binding upon the Court of Appeals	3
2. The Reasons asserted by Petitioners for issuing a Writ of Certiorari are not valid	10
Conclusion	12

Cases Cited

Bishop v. U. S., 266 F2d 657	10
Cordovan Associates, Inc. v. Dayton Rubber Co., 290 F2d 858	10
Freightways, Inc. v. Stafford, 217 F2d 831	10
Hart v. Gallis, 275 F2d 297	10
Iravani Mottaghi v. Barkey Importing Co., 244 F2d 238	10

PAGE

Koster v. Lumbermens Mutual, 330 U. S. 518 11

Orvis v. Higgins, 180 F2d 537 10

Romero v. Garcia & Diaz, Inc., 286 F2d 347 10

Rosenblum v. Dingfelder, 111 F2d 406 12

Sanders v. Leech, 158 F2d 486 10

Smallfield v. Home Ins. Co. of N. Y., 244 F2d 337 .. 10

Spencer v. Standard Chemicals & Metals, 237 N. Y. 479 12

U. S. v. Armature Rewinding Co., 124 F2d 589 10

U. S. v. Oregon Medical Society, 343 U. S. 326 10

U. S. v. U. S. Gypsum Co., 333 U. S. 364 10

STATUTES CITED

Securities Exchange Act of 1934:

Section 16(a) 2

Section 16(b) 3, 11

MISCELLANEOUS CITATIONS

2 Barron & Holtzhoff, Rules Ed., Sect. 482, p. 36 12

Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 950 12

IN THE

Supreme Court of the United States

October Term, 1962

No. 1093

IN THE MATTER

of

EDWARD LAMB, FRANK C. OSWALD, EDWARD LAMB ENTERPRISES, INC. and AIR-WAY INDUSTRIES, INC.,

Petitioners,

against

ISADORE BLAU, a stockholder of Air-Way Industries, Inc., suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Air-Way Industries, Inc.,

Respondent.

BRIEF OF RESPONDENT

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (Appendix D to Petition, p. 21) is reported in 314 F2d 618. There was no written opinion by the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered March 8, 1963 (Appendix E to Petition, p. 25). Jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code, which is made applicable by Section 27 of the Securities Exchange Act of 1934, 15 U.S.C.A., Sect. 78aa.

Question Presented

1. Where the undisputed *documentary* proof in the record clearly substantiated respondent's status as a stockholder of the Issuer, was the Court of Appeals bound by the contrary Findings of the trial court?

Statement

1. The Nature and Purpose of the Statute.

The congressional hearings, which followed the stock market crash of 1929, highlighted the inherent evils of unscrupulous speculations in the securities of public corporations by directors, officers and large stockholders who had access to "inside information" which was not available to the investors at large.

Section 16 of the Securities Exchange Act of 1934, 15 U.S.C.A., Sect. 78p, was the congressional answer to such "insider trading" abuses.

Section 16(a) of the Act requires every director or officer of an issuer having any of its securities registered with a national securities Exchange, as well as the beneficial owner of more than 10% of any class of such listed securities, to file monthly reports with the Securities and Exchange Commission and with the national Exchange concerning any change of his ownership in his issuer's securities.

The stated purpose of Section 16(b) of the Act is "preventing the unfair use of information which may have been obtained by such beneficial owner, director or officer by reason of his relationship to the issuer". In seeking to deter such "insider" from any possible temptation to improperly use "inside information" as the basis of speculation in his issuer's securities, Section 16(b) imposes an absolute liability upon him for any profits which he may realize from his purchases and sales, or sales and purchases of the issuer's securities within a six month period, "irrespective of (his) intention * * * in entering into such transaction".

The Issuer was made the gratuitous recipient of any "short-swing" profits recovered under this sub-section, not because it sustains any damages by reason of such transactions, but solely to vindicate the public policy against short-swing trading by its "insiders".

Under Section 16(b), suit to recover such profits may be instituted by the issuer, "or by the owner of any security of the issuer * * * if the issuer shall fail or refuse to bring suit within sixty days after request or shall fail diligently to prosecute the same thereafter".

2. Facts.

Respondent, a stockholder of the Issuer, Air-Way Industries, Inc., instituted this action to recover the short-swing profits allegedly realized by the other petitioners herein. The Issuer had failed and refused to initiate such action (Pl. Exs. 5 and 6; R. 138a, 248a, 139a, 250a).

In the 4½ years during which the case was pending in the district court, both the petitioners and respondent conducted extensive pre-trial and discovery proceedings and a veritable welter of motions were made by both sides, including several motions by the petitioners herein to dismiss the complaint and for summary judgment. *At no time* during these entire proceedings did the petitioners

raise any objection to challenge respondent's status as a stockholder of the Issuer or his right to maintain the action on its behalf.

Upon the commencement of the trial, respondent's counsel inquired whether the petitioners would stipulate "that the plaintiff, Isadore Blau, has been a stockholder of Air-Way Industries, Inc. since May 1, 1956, and that he presently is a stockholder" (R. 133a).

Petitioners' counsel then proceeded to make such concession in open court (R. 134a-135a). When the district court sustained an objection concerning the *price* which respondent had paid for the Issuer's stock, petitioners' counsel stated—I am sorry, but I can make no concession on the point whatever." The court then directed the respondent to prove his status as a stockholder (R. 135a).

The respondent was then called as a witness and testified to the following *uncontradicted* facts which were fully corroborated by undisputed *documentary proof* received in evidence:

(i) On May 1, 1956, respondent purchased for his own account 100 shares of the Issuer's common stock. This purchase was made through his stockbrokers, who sent the respondent a written confirmation thereof informing him that the aforesaid shares of the Issuer's stock "was this day Bought for your account and risk" and credited to respondent's account No. 1786B (Pl. Ex. 1; R. 135a, 228a).

(ii) At the time respondent had placed his purchase order for such stock, he had asked his brokers "to put it on my margin account". Upon executing respondent's stock purchase, his brokers sent him a written "Margin Call" requesting "a remittance for $470.00 as margin against these transactions, to reach us not later than Monday, May 7, 1956" (Pl. Ex. 37; R. 223a, 230a).

(iii) On May 3, 1956, respondent went to his brokers' offices and paid them the aforesaid "margin" call of

$470.00 *in cash*. He received a temporary hand-written receipt for such payment and subsequently received a printed receipt therefor (Def. Ex. A and B; R. 180a, 232a).

(iv) Under date of December 20, 1956, respondent received a written notice from his brokers that "We have this day Received * * * for your account No. 1786B" five additional shares of the Issuer's stock "a/c 5% stock dividend on 100 shs. to record holders of 11/27/56" (Pl. Ex. 2; R. 136a, 234a).

(v) During each of the consecutive months from May 1956 through May 1958, respondent had received from his brokers written statements of his Margin account with them which clearly showed, (a) his purchase of 100 shares of the Issuer's common stock in May 1956, (b) his cash payment to them of $470 on May 3, 1956, (c) his receipt on December 20, 1956, of an additional 5 shares of the Issuer's common stock which the latter had paid as a stock dividend to its record shareholders, and finally, (d) the delivery to him on May 9, 1958, of two stock certificates *registered in respondent's name* for 105 shares of the Issuer's common stock which had been held in his Margin account.* These statements showed respondent's *continuous* ownership of the Issuer's stock in Street Name until May 5, 1958, and indicated that his Margin account had been credited on June 1, 1956 and September 5, 1956, respectively, with *cash dividends* which the Issuer had paid to its common stockholders of record (Pl. Exs. 35, 36; Def. Exs. G, H, I; R. 149a, 218a, 238a-246a).

(vi) Respondent introduced the actual stock certificate, registered in his name, for 5 shares of the Issuer's common stock, which clearly showed his *record ownership* thereof since May 5, 1958 (Pl. Ex. 4; R. 137a, 236a).

---

* The additional 100 shares, represented by the second stock certificate, had been sold by the respondent a short time before the trial.

The respondent instituted the action against the petitioners in the district court on October 11, 1956 (R. 1a).

Despite the repeated objections by respondent's counsel, the trial court allowed the respondent to be cross-examined with respect to the source of his funds with which he had purchased the Issuer's stock, although such facts were wholly immaterial and irrelevant to respondent's status as a stockholder of the Issuer and his right to maintain the action on its behalf (R. 150a, 153a, 155a-157a, 203a-205a, 208a-210a, 217a-222a, 226a).

In overruling respondent's objections to such cross-examination, the trial court stated that this line of questions "is highly relevant" to show whether the respondent is "the real party in interest in this lawsuit" (R. 144a, 145a, 150a).

When respondent's counsel pointed out that petitioners' answer contained "no affirmative defense that the plaintiff is not the proper party in interest," and that "this is the first time" such issue was raised—the court stated that "if the defendant wishes to amend its pleadings at this time I will entertain a motion." The court then granted the subsequent motion by the petitioners "to set up the fact that the nominal plaintiff" was "not the real party in interest at the time of the institution of this action" (R. 152a, 153a).

Although the respondent repeatedly testified without contradiction that he had purchased the 100 shares of the Issuer's common stock *with his own funds*, the court continued to insist that the respondent produce some "*record* substantiating the fact that it was *your* money that paid for this stock" (R. 208a, 209a). Respondent responded that he did not have such *record*.

At the conclusion of respondent's testimony, the petitioners moved to dismiss the complaint and for judgment upon the alleged ground "that the plaintiff has failed to

prove * * * that the action is brought by the real party in interest" (R. 225a).

In granting petitioners' motion to dismiss, the trial court completely disregarded the undisputed documentary proof and stated that it did not believe respondent's testimony because of "his many inconsistent answers" and "the incredible tale he gives of the *source of this money*" with which he had purchased the Issuer's stock; that "the improbability of the *source of the funds* * * * overcome any written documents which simply go to show that the stock was held in his name and don't show that he was the *true owner* of it or that he was acting as anything other than a nominee for somebody" (R. 225a-227a).

Argument

1. The Findings of the Trial Court Were Clearly Erroneous, and, Therefore, Not Binding Upon the Court of Appeals.

In reversing the judgment of the trial court, the Court of Appeals specifically referred to respondent's undisputed documentary proof which clearly evidenced the latter's purchase and continuous ownership of the Issuer's stock. The appellate court expressly found from such undisputed documentary proof that the respondent "obviously had sufficient indicia of ownership to protect his right under the statute and the usual construction of F.R. 17(a), the real-party-in-interest rule."

Moreover, although the record was entirely barren of any proof whatsoever to even *indicate*, let alone substantiate, that, in purchasing the Issuer's stock, the respondent allegedly was acting as "nominee" for a so-called non-existent and unnamed "another person"—the trial court, nevertheless, expressly made such a finding (See Finding No. 30; R. 124a), and made it the basis for its judgment of dismissal.

In reviewing the record, however, the Court of Appeals noted that such a finding by the trial court "has no support whatsoever in the evidence", but "at best it is only a guess." Moreover, in reversing the trial court's findings which formed the basis for the latter's ultimate conclusion that the respondent allegedly was not the "owner" of the Issuer's shares or the "real-party-in-interest" because he had allegedly failed to prove that the payment for his purchase of such stock had been effected with his own funds—the appellate court correctly found that the trial court erred as a matter of law in that it "took an unduly technical view of the requirement of ownership, thus defeating the remedial purposes of the statute".

Although the findings of a trial court will not usually be disturbed unless they are "clearly erroneous", the record fully substantiated the appellate court's reversal of such findings upon that ground.

The trial court's findings were "clearly erroneous" for the following reasons:

(a) It completely ignored the clear and uncontradicted *documentary* evidence and, although not disputing its credibility, nevertheless, made several crucial findings which, not only were wholly unsupported by any competent or relevant evidence, but, indeed, were completely contrary and at variance thereto, and adverse to any legal inferences which could properly be drawn therefrom.

(b) It erroneously assumed that unless the respondent adduced conclusive documentary proof that the funds with which he had purchased the Issuer's shares of stock were his own, "it would * * * be evidentiary of the fact that he didn't own (such stock)" and, therefore, could not maintain the action (R. 220a).

(c) It erroneously misapplied the law to the facts by concluding that the respondent was not a stockholder of the Issuer and could not maintain the action on its behalf.

despite its express finding that the respondent was and had been the "record owner" of the Issuer's stock since "May 9, 1958"; a period of more than three years prior to the date the case was tried (See Findings Nos. 3, 4; R. 121a).

(d) It erroneously ruled that the respondent was not the owner of any security of the Issuer, although the clear *prima facie* proof thereof was not countervailed or offset by any other competent or relevant evidence.

(e) It misapplied the law to the facts by ruling that the respondent was not a stockholder of the Issuer at the time he instituted the suit, i.e., October 11, 1956, although its finding, that the respondent was the "record owner" of the Issuer's stock since May 9, 1958, supported the only logical inference, fully buttressed by credible and uncontradicted *documentary* proof, that such "record" ownership stemmed from his purchase of the stock in Street Name on May 1, 1956, and his continuous *beneficial* ownership thereof until the date it was transferred to him "of record".

(f) It erroneously overruled respondent's objections to irrelevant and immaterial evidence with respect to collateral matters, predicating its alleged evidentiary and conclusory findings thereon.

(g) It erroneously assumed that the appellant had the burden of proving he was the "real party in interest", although the burden of proving that he was *not* the real party in interest—an affirmative defense which was raised for the *first time during the trial*—rested with the petitioners.

(h) It erroneously granted petitioners' motion to dismiss the action and for judgment upon the ground that the respondent allegedly was *not* the real party in interest, although the record clearly showed, and the court expressly found, that the respondent was the "record owner" of the

Issuer's stock, and, therefore, *was in fact and law* the real party in interest.

Although the phrase, "clearly erroneous" is not defined by any statute and has no "fixed meaning" but "varies with the nature of the evidence",[1] it has been held to be applicable to cases where, (i) "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed";[2] (ii) "the testimony considered as a whole convinces (the appellate court) that the finding * * * does not reflect or represent the truth and right of the case";[3] the trial court's finding is "without substantial evidence to support (it) or where the court misapprehended the effect of the evidence".[4]

Moreover, the findings of the trial court are not binding upon and will be reviewed by the appellate court where, (i) "the evidence is partly oral and the balance is written or deals with undisputed facts";[5] (ii) they were "induced by an erroneous view of the law" such as "erroneously" admitted evidence * * * as to collateral matters";[6] (iii) they "combine both facts and law, when there is an error as to the law";[7] (iv) an "irreconcilable conflict exists between ultimate findings of fact";[8] or, (v) the "ultimate finding is contrary to the evidentiary findings".[9]

---

[1] *Iravani Mottaghi v. Barkey Importing Co.* (2 C.A.), 244 F2d 238, 248.

[2] *U. S. v. U. S. Gypsum Co.*, 333 U. S. 364, 395; *U. S. v. Oregon Medical Society*, 343 U. S. 326, 339; *Romero v. Garcia & Diaz, Inc.* (2 C.A.), 286 F2d 347, 356; *Bishop v. U. S.* (5 C.A.), 266 F2d 657, 666.

[3] *Sanders v. Leech* (5 C.A.), 158 F2d 486, 487; *Bishop v. U. S.*, *supra*.

[4] *Hart v. Gallis* (7 C.A.), 275 F2d 297, 299.

[5] *Orvis v. Higgins* (2 C.A.), 180 F2d 537, 539.

[6] *Smallfield v. Home Ins. Co. of N. Y.* (9 C.A.), 244 F2d 337, 341.

[7] *Cordovan Associates, Inc. v. Dayton Rubber Co.* (6 C.A.), 290 F2d 858-860.

[8] *Freightways, Inc. v. Stafford* (8 C.A.), 217 F2d 831, 835.

[9] *U. S. v. Armature Rewinding Co.* (8 C.A.), 124 F2d 589, 591.

2. The Reasons Asserted by Petitioners for Issuing a Writ of Certiorari Are Not Valid.

From the standpoint of interest, this case merely involves an asserted liability of insiders to a private corporation on the special facts presented. From the standpoint of legal issues, this case presents only a question of the proper interpretation of Section 16(b) of the Securities Exchange Act of 1934 in connection with the evidence presented. It is submitted that these are not matters of national scope, or of great concern to the investing public of the United States.

Petitioners assert that since the respondent was unable to satisfy the trial court "as to the *source of the funds* which he claimed to have paid to the brokers as a portion of the purchase price for the issuer's stock", it was justified in finding "that he did not pay for it and was not the owner thereof" and, therefore, not the real party in interest to maintain the action.

Petitioners overlook the undisputed *documentary* proof which clearly established respondent's purchase and payment for the Issuer's stock. The appellate court was completely justified in reviewing such documentary proof, which demonstrated that the respondent was the "owner" of the Issuer's stock within the meaning of the statute and the real party in interest to maintain the action, and that the contrary findings by the trial court were clearly erroneous.

In a derivative suit, "the cause of action which such plaintiff brings before the court is not his own but the corporation's. *It* is the real party in interest and he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual, because it is disabled from protecting itself".[10]

---

[10] *Koster v. Lumbermens Mutual*, 330 U. S. 518, 522, 523.

The rule is that "equitable owners as well as registered owners are 'shareholders' for the purpose of bringing a derivative action,"[11] and as such are the real parties in interest for purposes of maintaining any action on the issuer's behalf. And this is so *regardless* of "the consideration (he) paid, the purpose of (his purchase), the use to be made of the proceeds collected".[12]

Since such cause of action "is owned and may be sued upon by someone, all a defendant may properly ask is such a party plaintiff as will render the judgment final and *res adjudicata* of the right sued upon".[13]

The case has been correctly decided by the Court of Appeals, and this Court should not be required to pass upon it again. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

June 5, 1963.

Respectfully submitted,

MORRIS J. LEVY,
Attorney for Respondent.

---

[11] *Multiparty Litigation in the federal courts*, 71 Harv. L. Rev. 874, 950.

[12] *Spencer v. Standard Chemical & Metals*, 237 N. Y. 479, 480.

[13] *Rosenblum v. Dingfelder* (2 C.A.), 111 F2d 406, 407; 2 Barron & Holtzhoff, Rules Ed., Sect. 482, p. 36.